

# DECLARATION OF EMERGENCY

## Department of Revenue Office of Alcohol and Tobacco Control

### Tobacco Permits (LAC 55:VII.3101-3123)

The Louisiana Department of Revenue, Office of Alcohol and Tobacco Control (ATC), pursuant to the rulemaking authority granted by R.S. 26:922 and R.S. 26:926 and the emergency rulemaking authority granted by R.S. 49:962 of the Administrative Procedure Act hereby amend and adopt LAC 55:VII.3101 and 3115-3123 related to the sale, certification of vapor and alternative nicotine products, and the VAPE Directory for the protection of public health. The Emergency Rule, effective September 29, 2023, will remain in effect for a period of 180 days.

Pursuant to Act 414 of the 2023 Regular Session of the Louisiana Legislature, the agency finds it necessary to promulgate an Emergency Rule to prevent imminent peril to the public health, safety, or welfare due to the risk of online sales and sale of products not in compliance federal and state laws and requirements. Act 414 provides a certification process for manufactures of vapor and alternative nicotine whereby any product not certified before November 1 2023 will be prohibited for sale in Louisiana that are currently offered and sold by licensed retailers and wholesalers. The rules provide the mechanism to certify products, the renewal and VAPE Directory that is required to be posted in order to remove unapproved and unsafe products from the stream of commerce.

The Emergency Rule shall have the force and effect of law upon signature and will remain in effect for a maximum of 180 days, unless renewed by the commissioner of alcohol and tobacco control or until permanent rules are promulgated in accordance with law, whichever occurs first.

### Title 55 PUBLIC SAFETY Part VII. Alcohol and Tobacco Control Subpart 2. Tobacco

#### Chapter 31. Tobacco Permits

#### §3101. Definitions

A. . . .

Alternative nicotine product (ANP) – any noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means. “Alternative nicotine product” does not include any of the following:

(a) Tobacco product.

(b) Vapor product.

(c) Product that is a drug pursuant to 21 U.S.C. 321(g)(1).

(d) Device pursuant to 21 U.S.C. 321(h).

(e) Combination product described in 21 U.S.C. 353(g).

An “alternative nicotine product” may be referred to as the acronym ANP.

**Product Offered for Sale** – each unique product identified by brand name and SKU code constitutes a separate product offered for sale in this state.

**Stock Keeping Unit (SKU)** – unique code per product consisting of letters and numbers that identify characteristics about each product such as by manufacturer, brand, size, or other similar information.

**Third Party Delivery Agent** – the mailing carrier service retained by the seller to transport and deliver by mail vapor products or alternative nicotine products to the recipient. Mailing carrier services may include but is not limited to Fed Ex, UPS, DHL, and other similar mailing carriers.

**V.A.P.E. Directory** – the directory compiled by the ATC pursuant to R.S. 26:926 which lists alternative nicotine products and vapor products approved for wholesale distribution or retail sale in the state. VAPE is an acronym that stands for “Vapor and Alternative nicotine Products and Electronic cigarettes.

**Vapor product** – any noncombustible product containing nicotine or other substances that employs a heating element, power source, electronic circuit, or other electronic, chemical or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine or other substances. “Vapor product” includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any vapor cartridge or other container of nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. “Vapor product” does not include any of the following:

(a) Product that is a drug pursuant to 21 U.S.C. 321(g)(1).

(b) Device pursuant to 21 U.S.C. 321(h).

(c) Combination product described in 21 U.S.C. 353(g).

AUTHORITY NOTE: Promulgated in accordance with R.S. 49:953(B), R.S. 26:922 and R.S. 26:926.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Office of Alcohol and Tobacco Control, LR 24:1320 (July 1998), amended LR 38:145 (January 2012), amended LR 40:1114 (June 2014), amended by the Department of Revenue, Office of Alcohol and Tobacco Control, LR \_\_\_\_\_

### **§3115. Sales, Online Sale, Age Verification Requirements, and Delivery**

A. ~~Before a seller mails, ships or otherwise delivers cigarettes, cigars, pipe tobacco, chewing tobacco, smokeless tobacco, or any other tobacco products of any kind in connection with a sale, the seller must verify the consumer’s age through electronic or written communication.~~ Sales - Each licensed seller is responsible for ensuring that all sales of tobacco products, vapor products or ANP to any person shall comply with the following requirements:

1. No licensed seller may sell or offer for sale to a consumer any vapor products or ANP or tobacco products as defined by R.S. 26:901(30) to any person under 21 years of age;

2. Each licensed seller holding a valid retail dealer permit as defined by R.S. 26:902(1) who over the counter or by vending machine sells or offer for sale vapor products, ANP or tobacco products as defined by R.S. 26:902(30) shall verify age by means of photographic identification containing the bearer's birthdate that the person purchasing the product is not younger than 21 years of age;

~~B. Persons accepting purchase orders for delivery sales may request that prospective consumers provide their email addresses.~~ Online Sales – Pursuant to R.S. 26:911D, at the time of any online purchase, whereby the seller is the manufacturer of vapor products or ANP holding a valid unsuspended retailer dealer permit may receive online orders and accept payment via the Internet or through a mobile application or similar technology. Prior to the seller mailing, shipping, or otherwise delivering the products, the seller shall obtain and verify the age of the recipient through the use of a real-time electronic age verification platform that shall be approved by the commissioner and such platform shall be capable of both of the following:

1. Age Verification System - Verifying proof of age through authoritative digitized identification card technology.

a. An authoritative digitized identification card technology may include but is not limited to an electronic age-verification platform utilized prior to completion of the online transaction, whereby the platform verifies the recipient's full name, birth date, and residential address of that person through the use of commercially available database or aggregate of databases, consisting primarily of data from government sources, that are regularly used by government and businesses for the purpose of age and identity verification and authentication to ensure that the purchaser is at least 21 years old. No database being used for age and identity verification for this purpose shall be in the possession or under the control of the seller or subject to any changes or supplementation by the seller.

b. Storing the recipient's name, age, birthdate, the expiration date of the identification and the date and time the identification was verified.

2. Shipping Label - All shipments to consumers made by a licensed retail seller of any vapor products, electronic cigarettes, or alternative nicotine products, shall be packaged and marked on the same surface of the delivery address with a label containing a statement that is clear and conspicuous as follows:

a. The words "Vapor Product, Electronic Cigarette, or Alternative Nicotine Product – Shipment" shall be marked and clearly visible on both the front and back of the packing in lettering measuring at least ¼ inch in height.

b. The words "Unlawful to Sell or Deliver to Anyone under 21 Years of Age" must be clearly visible on the front of the package, in lettering at least ¼ inch in height.

c. The seller's retail dealer permit number shall be clearly displayed on the front of the package.

d. All shipments shall have affixed to the exterior packaging a notification to the person making the delivery that the signature of the recipient is required prior to the delivery. The notice should be at least 3-inch by 3-inch and contain words similar to the following:

ATTENTION  
Courier

(Signature Required)

Deliver to RECIPIENT address only. No indirect delivery. Disregard any Signature Release. Recipient MUST be at least 21 years old.

3 Delivery - At the time of any delivery of any vapor products, electronic cigarettes, or ANP purchased online, a third-party delivery agent shall obtain the recipient's signature and verify the age of the recipient through the use of an electronic age verification device that shall be approved by the commissioner.

a. Such device shall be capable of the following:

i. Verifying proof of age through technology of a magnetic card reader or an alternative technology capable of verifying proof of age.

ii. Reading a valid state-issued driver's license, a valid state issued identification card, a valid military identification card, or a valid passport.

iii. Storing the recipient's name, age, date of birth, the expiration date of the identification, and the date and time that the identification was scanned.

b. The third party delivery agent shall refuse delivery and return the vapor product, electronic cigarette, or alternative nicotine product to the seller if:

i. The recipient does not produce a valid and current form of identification as provided in R.S. 26:911A.

ii. There is reason to doubt the authenticity or correctness of the recipient's identification.

iii. The recipient refuses to sign for the receipt of the delivery.

~~B. Persons accepting purchase orders for delivery sales may request that prospective consumers provide their e-mail addresses.~~

~~C.~~ No retailer may sell or deliver cigarettes, cigars, pipe tobacco, chewing tobacco, smokeless tobacco, or any other tobacco product of any kind in a retail establishment to any person through any unattended or self-service checkout counter or mechanical device unless the customer submits to a clerk a valid driver's license, selective service card, or other lawful identification that on its face establishes the age of the person as ~~18~~ 21 years or older and there is no reason to doubt the authenticity and correctness of the identification prior to approaching the self-checkout counter.

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:833, R.S. 49:953(B), R.S. 26:922 and R.S. 26:926.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Office Alcohol and Tobacco Control, LR 31:2035 (August 2005), amended by the Department of Revenue, Office of Alcohol and Tobacco Control, LR \_\_\_\_\_

### **§3117. Importation of Cigarette by Wholesaler Only**

A. Cigarettes, as defined in R.S. 26:901, produced or manufactured outside of this state cannot be sold or offered for sale in Louisiana, or shipped or transported into the state except to the holder of a wholesaler's permit. Delivery of cigarettes produced or manufactured outside of this state must be made at the

place of business of the wholesaler shown on the wholesale dealer's permit, and must be received and warehoused by the wholesaler at that place of business, where such cigarettes must come to rest before delivery is made to any retailer.

B.-C. . . .

D. Any retailer of cigarettes who violates any provision of this Section will be subject to a civil penalty in ~~the amount of \$25,000~~ accordance with R.S. 47:877. Any retailer that sells and ships directly to consumers in Louisiana pursuant to Subsection B of this Section must, on the application for authority to make such shipments filed with the secretary of the Department of Revenue in accordance with Subsection C of this Section, acknowledge in writing the civil penalty established in this Subsection and must consent to the imposition thereof upon violation of this Section. The secretary may initiate and maintain a civil action in a court of competent jurisdiction to enjoin any violation of this Section and to recover the civil penalty established in this Subsection, together with all costs and attorney fees incurred by the secretary incidental to any such action.

AUTHORITY NOTE: Promulgated in accordance with R.S. 49:953(B), R.S. 26:922 and R.S. 26:926.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Office of Alcohol and Tobacco Control, LR 31:2036 (August 2005), amended LR 40:1115 (June 2014), amended by the Department of Revenue, Office of Alcohol and Tobacco Control, LR \_\_\_\_\_

### **§3121. Stamping Agent Designation Requirements**

A. Requirements - Pursuant to R.S. 26:902(2)(a), a stamping agent designation shall be issued as a secondary permit to a dealer that engages in the business of purchasing unstamped or non-taxed paid cigarettes that meets all requirements of a wholesale dealer as defined by R.S. 26:906H and at the time of application, produces the following documentation:

1. A copy of a direct purchasing agreement with a cigarette manufacturer or importer of cigarettes who holds a valid permit issued pursuant to 26 U.S.C. 5713 or from a sales entity affiliate whose name and address has been provided to the attorney general pursuant to R.S. 13:5073(A)(7).

2. Maintain on the premises to be licensed a tax stamping machine capable of opening a carton of cigarettes, affixing stamps on all packs, and capable of resealing the carton of cigarettes.

3. Shall comply with all requirements as provided by R.S. 26:916H.

B. Stamping Agent required for Retail and Wholesale Sales of Vape Products, ANP and Electronic Cigarettes.

1. Pursuant to R.S. 26:911B(1)(b), no retailer shall purchase ANP, vape products, or electronic cigarettes products for resale except from a wholesale dealer operating with a valid unsuspended wholesale dealer permit and a valid stamping agent designation.

2. No wholesale dealer operating with a valid unsuspended permit may sell or offer for sale any ANP, vape products, or electronic cigarettes products for resale unless wholesale dealer also holds a valid stamping agent designation pursuant to R.S. 26:902(2)(a).

a. Stamping agent designation shall be valid only if issued in conjunction with a valid Louisiana tobacco wholesale permit. In the event the tobacco wholesale permit is not valid or expires, the stamping agent designation will also be invalidated.

AUTHORITY NOTE: Promulgated in accordance with R.S. 49:953(B), R.S. 26:922 and R.S. 26:926.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Office of Alcohol and Tobacco Control, LR 31:2036 (August 2005), amended LR 40:1115 (June 2014), amended by the Department of Revenue, Office of Alcohol and Tobacco Control, LR \_\_\_\_\_

### **§3123. V.A.P.E. (“Vapor and Alternative nicotine Products and Electronic Cigarettes) Certification and Directory**

A. Initial Certification and Renewal Applications - Beginning October 1, 2023, every vapor product manufacturer and ANP manufacturer whose products are sold in Louisiana, whether directly or through a wholesale dealer, retail dealer, or similar intermediary or intermediaries, must submit to the agency a certification form for each product per SKU and certify under penalty of perjury the products meets one of the requirements provided by R.S. 26:926A.

1. Initial Certification Fee – The initial fee for certification shall be \$100 per product SKU. Each manufacturer must submit to the ATC a completed certification form as provided by the agency or submit certification form electronically through the agency’s online portal with applicable fees and supporting documentation. Failure to submit the required fees and/or supporting documents will result in denial of certification application.

a. Each product SKU certification will expire or become inactive annually on October 31<sup>st</sup>.

2. Annual Renewal Certification Fee – To remain active on the V.A.P.E Directory, all SKU(s) must be recertified annually at a cost of \$100 per product SKU.

a. Each SKU shall be required to be recertified annually by the ANP or vapor product manufacturer on or before November 1<sup>st</sup> of each year. Recertification period will be available beginning September 1<sup>st</sup> through October 31<sup>st</sup> of each year and must be submitted electronically through the agency’s online portal permitting system, unless a different method to renew is otherwise provided by commissioner. The annual renewal application and fees must be received by the agency during the renewal period to be considered timely.

3. Expiration of Certification – If the manufacturer’s certification expires, the manufacturer must remit a new initial certification application with supporting documents and fees and any associated penalty, if applicable, to be recertified for consideration that eligible products be added to the V.A.P.E Directory.

B. V.A.P.E Directory – Pursuant to R.S. 26:926A, beginning November 1, 2023, and on the 1<sup>st</sup> of each month thereafter, the agency will post to its website a directory of listing a certified manufacturer of vapor products, ANP, or electronic cigarettes along with a listing of the certified and approved products for sale in Louisiana.

1. Only products published on the V.A.P.E Directory may be offered for sale in Louisiana by any wholesaler or retailers. All other products are subject to penalties as provided by law.

C. Penalties and Fines

1. Manufacturer Penalty – \$1000 fine per day for each vapor product or ANP offered for sale by the manufacturer that is not listed on the VAPE Directory until the offending product is removed from the market or until the offending product is properly listed on the directory.

a. Manufacturers offering sale of products online is required to post language restricting sale of any item not listed on the VAPE Directory and restrict the completion of any sale of uncertified products intended to be delivered into Louisiana.

2. Manufacturer Failure to Timely Notify Commissioner of Material Change – Pursuant to R.S. 26:926C, any manufacturer submitting a certification shall notify the commissioner in writing within 30 days of any material change to the certification as provided by law. Failure to notify the commissioner timely will result in removal of product from the V.A.P.E Directory and such failure may be subject to penalty as prescribed by R.S. 26:926J.

3. Retailer or Wholesaler Penalty - Wholesalers and Retailers are required to cease the sale or offer for sale of any products not listed on the V.A.P.E Directory posted on the agency's website on the 1<sup>st</sup> of each month. All Wholesalers and Retailers are responsible to review the directory published on the agency's website and take the necessary actions to remove and cease the sale of any product not listed on the directory.

a. Each SKU per product sold or offered for sale including displayed for sale, or possession of each product not listed on the V.A.P.E Directory on or within the retail or wholesale space located in Louisiana is subject to the provisions of R.S. 47:858, 47:859 and R.S. 47:860 and constitute a separate violation per SKU per product in violation of R.S. 26:909A(5).

b. All ANP or vapor products not listed on the V.A.P.E Directory are required to be remove from the licensed premises by the 5<sup>th</sup> of each month or such possession of each unapproved product per SKU subject to the provisions of R.S. 47:858, 47:859 and R.S. 47:860 and constitute a separate violation per SKU per product in violation of R.S. 26:909A(5).

AUTHORITY NOTE: Promulgated in accordance with R.S. 49:953(B), R.S. 26:922 and R.S. 26:926.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Office of Alcohol and Tobacco Control, LR 31:2036 (August 2005), amended LR 40:1115 (June 2014), amended by the Department of Revenue, Office of Alcohol and Tobacco Control, LR \_\_\_\_\_